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Docket Entries.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Case No. 73-C-1200

Date	*Filings-Proceedings*
8/ 9/73	Complaint filed. Summons issued.
8/14/73	Order to Show Cause dated 8/9/72, returnable 8/17/73 for Order enjoining enforcement of Local Law No. 1 of 1973 filed.
8/20/73	Affidavit of Joseph H. Darago in opposition to motion for preliminary injunction of Local Law No. 1 of 1973, and Memorandum of Law on behalf of Frank Doran filed.
8/20/73	Memorandum of law on behalf of Louis J. Frank, filed.
8/21/73	Affirmation of Ralph J. Nappi, in opposition to motion for preliminary injunction filed.
8/22/73	Affidavits of service of Memorandum of Law, of Frank Doran and Louis Schultz filed.
8/22/73	Summons returned and filed with affidavits of service executed.
8/22/73	Affidavit of Joseph Foley filed.
8/27/73	Stenographer's transcript dated 8/22/73 filed.
8/30/73	Motion for leave to participate as amicus curiae by Town of Huntington, New York filed.

Docket Entries.

Date	*Filings-Proceedings*
8/30/73	Answer of Louis J. Frank filed.
9/ 5/73	Answer of Frank Doran filed.
9/ 7/73	Order by Bartels, J. dated 9/6/73 that pending final determination of action, defendants are enjoined from prosecuting plaintiffs. P/C mailed to attorneys.
9/12/73	Notice of Appeal filed. Duplicate of appeal and duplicate of the docket entries mailed to C/A.
9/19/73	Answer of Howard Einhorn filed.
9/25/73	Record on Appeal certified and mailed to C/A.
10/ 4/73	Acknowledgment received from C/A for receipt of Index to Record on Appeal.
8/ 5/74	Certified copy of judgment and opinion received from C/A affirming Order of District Court filed.

Docket Entries.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Case No. 73-2436

Date	*Filings-Proceedings*
9/17/73	Copies of docket entries and notice of appeal filed.
9/27/73	District Court record filed.
1/15/73	Motion extending time to file brief and appendix by Frank Doran to 11/19/73 filed.
11/21/73	Order granting motion for leave to file brief and appendix by Frank Doran filed.
11/21/73	Brief and appendix by Frank Doran filed with proof of service.
1/ 2/74	Motion for extension of time to file Salem Inn's brief filed.
1/ 3/74	Order granting motion to file Salem Inn's brief filed.
1/ 3/74	Salem Inn's brief filed with proof of service.
2/ 5/74	Motion for leave to file brief amicus curiae by Town of Huntington with proof of service.
2/13/74	Order granting motion for leave to file brief amicus curiae by Town of Huntington filed.

Docket Entries.

3/ 5/74	Argument heard (by: Lumbard, Oakes, Timbers).
3/14/74	Amicus curiae brief by Town of Huntington with proof of service filed.
6/25/74	Judgment affirmed, Oakes, C.J.; dissent in separate opinion, Lumbard, C. J.; judgment filed.
7/ 9/74	Salem Inn's itemized and verified bill of costs with proof of service filed.
8/ 1/74	Statement of costs filed.
8/ 1/74	Issued mandate (opinion, judgment, and statement of costs).
8/15/74	Copy of notice of appeal to Supreme Court filed.
10/10/74	Notice of filing of appeal (74-337) filed.
1/27/75	Certified copy of order of Supreme Court noting probable jurisdiction filed.

Complaint.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73 C 1200

SALEM INN, INC., M & L REST, INC., and TIM-ROB BAR, INC.,
Plaintiffs,

against

LOUIS J. FRANK, Individually and as Police Commissioner of Nassau County, FRANK DORAN, Individually and as town attorney of the town of North Hempstead and HOWARD EINHORN, Individually and as Chief of Police of the Village of Port Washington,

Defendants.

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1. This is an action for injunctive relief and declaratory relief pursuant to Title 28, United States Code, Section 2201 and arises under Title 42, United States Code, Section 1983. The jurisdiction of this court is invoked pursuant to Title 28, United States Code, Section 1343.

(a) The matter in controversy arises under the Constitution and the laws of the United States of America;

(b) This is an action to redress the deprivation, under color of law, of the rights, privileges and immunities secured to plaintiffs by the Constitution of the United States of America;

(c) This is an action to secure equitable relief for the protection of plaintiffs' civil rights;

(d) This is an action to have declared unconstitutional and to enjoin the enforcement, operation and execution of Local Law No. 1-1973 of the Town of North Hempstead.

PARTIES

2. Plaintiff, Salem Inn, Inc., is a domestic corporation and is the operator of the Salem Inn located at 352 Port Washington Boulevard in the village of Port Washington, Town of North Hempstead, County of Nassau, State of New York.

3. Plaintiff, M & L Rest, Inc., is a domestic corporation and the operator of the Miramar Bar located at 672 Port Washington Boulevard in the village of Port Washington, Town of North Hempstead, County of Nassau, State of New York.

4. Plaintiff, Tim-Rob Bar, Inc., is a domestic corporation and the operator of the Interlude Lounge located at 1656 Hillside Avenue, New Hyde Park, Town of North Hempstead, County of Nassau, State of New York.

5. Defendant, Louis J. Frank, is the Police Commissioner of the County of Nassau and as such is responsible for the enforcement of the laws of the Town of North Hempstead within the Town of North Hempstead.

6. Defendant, Frank Doran, is the town attorney for the Town of North Hempstead and as such is in charge of administering and enforcing the laws of the Town of North Hempstead.

7. Defendant, Howard Einhorn, is the Chief of Police of the Village of Port Washington, and as such is responsible for the enforcement of the laws of the town of North Hempstead in the village of Port Washington.

LOCAL LAW IN ISSUE

8. Local Law No. 1-1973, of the Town of North Hempstead (hereinafter referred to as the Law), the full text of which is annexed hereto and made a part hereof as Exhibit A, makes it unlawful for any person who conducts, maintains, or operates any premises open to the public, including but not limited to any bar or lounge to permit any person to appear in such premises with uncovered breasts. The law also makes it unlawful for a person to appear in such premises with uncovered breasts. Any person who violates this Law is punishable by a fine not exceeding $500.00 or imprisonment for a period not to exceed 15 days or both. The Law became effective July 17th 1973.

GROUNDS FOR RELIEF

9. Plaintiffs are lessees and operators of premises open to the public within the jurisdiction of this court, in which female dancers with uncovered breasts have been providing entertainment for adult patrons. This entertainment by female dancers is expression presumptively protected under the First Amendment of the United States Constitution.

10. Plaintiffs have invested substantial sums of money in the said bars which have a large and loyal following among the adult members of the community who desire to be entertained by the topless dancers.

11. Plaintiffs have provided topless dancing entertainment for a number of years until the Law became effective on July 17th 1973. Since that time plaintiffs and their dancers under fear and threat of arrest and prosecution have ceased to provide topless dancing entertainment, thereby succumbing to the chill placed upon the exercise of their First Amendment rights.

12. This cessation of topless dancing entertainment has resulted in a marked diminution of plaintiffs' business since the clientele of plaintiffs' businesses are accustomed to topless dancing entertainment and patronize the plaintiffs' establishments with the expectation of being entertained thereby.

13. The dancers which perform in plaintiffs' bar are employed only as topless dancers. They are not waitresses and perform no other function on the premises. They dance on stages and are well received by patrons.

14. Only adults are permitted to enter the bars. The patrons never go near the dancers. The dancing is performed in a decorous manner and never offends any of the patrons.

15. Conspicuous signs clearly advise prospective patrons of the nature of the entertainment offered in the premises and thereby deter adults who would be offended by such entertainment from entering the premises.

16. Compliance with the Law has resulted in substantial curtailment of the businesses of plaintiffs and ultimately can result in forcing the plaintiffs to go out of business.

17. Compliance with the Law has forced the dancers to be instructed to fully cover their breasts while dancing therefore chilling the exercise by plaintiffs and their dancers of their First Amendment rights.

18. The Law deprives the patrons of the plaintiffs' bars of the right to view constitutionally protected expression.

19. The Law on its face and as applied to the exercise of First Amendment rights is so discretionary, vague and

overbroad and devoid of objective guidelines as to restrain and chill the exercise of such rights in violation of the First and Fourteenth Amendments, in that it forbids the exhibition of non-obscene expression presumptively protected by the First Amendment.

20. The Law as applied bears no rational relationship to a valid governmental purpose and as such is violative of the Fourteenth Amendment.

21. The Law as applied has as its sole purpose suppression and as such is violative of the Fourteenth Amendment.

22. The Law is causing plaintiffs great and immediate irreparable harm and plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs demand:

(1) A declaratory judgment that Local Law No. 1-1973 of the town of North Hempstead is unconstitutionally violative of the First and Fourteenth Amendments to the United States Constitution on its face and as applied.

(2) A permanent injunction prohibiting the defendants, their agents, servants and employees, from in any enforcing Local Law No. 1-1973 of the town of North Hempstead with respect to plaintiffs' premises where entertainment is provided by dancers with uncovered breasts.

(3) The costs of this action.

(4) Such other, further and different relief as may be just and proper.

KASSNER & DETSKY
Attorneys for Plaintiffs

Exhibit A, a Portion of the Resolution of Town Board of Town of North Hempstead Enacting Local Law No. 1 of 1973, Annexed to Foregoing Complaint.

PLEASE TAKE FURTHER NOTICE that the proposed Local Law shall read as follows:

TOWN OF NORTH HEMPSTEAD

Local Law No. 1—1973

A Local Law Prescribing the Regulation of Cabarets, Bars, Lounges, Dance Halls, Discotheques and Other Public Places in General.

SECTION 1.0—LEGISLATIVE PURPOSE

It is hereby declared the policy of the Town Board of the Town of North Hempstead, County of Nassau, State of New York, that in order to preserve public peace and good order, and to safeguard the health, safety, welfare and morals within the unincorporated areas of the Town of North Hempstead, it is necessary to regulate and control the operations of public places used as cabarets, bars or lounges, dance halls, discotheques and other public places in general so as to fix certain responsibilities and duties of persons owning, operating or controlling such establishments and of persons employed, whether for hire or not, in such establishments.

SECTION 2.0—DEFINITIONS

1. Public Place—Any room, place, or space which is occupied or arranged to be occupied for recreational, amusement, social, sports, serving of food, or similar purposes; or any building, shed or enclosure, whether indoor or outdoor, coming within the occupancy and other similar

classifications of this section. For the purposes of interpretation, the term "public place", where used in this law, shall include the term "public assembly" or "assembly" as may be used in other codes, laws, ordinances, rules or regulations, as may be applicable in the Town of North Hempstead.

2. Cabaret—Any public place directly or indirectly selling or serving food, drink, or alcoholic beverages to the public and in which any musical entertainment, singing, dancing in a designated area, or other form of amusement is also permitted, and shall include such a room, place, or space which provides incidental musical entertainment by mechanical devices with or without dancing.

3. Bars, Lounges or Discotheques—Any public place in which the business of directly or indirectly selling and/or serving food, drink, or other beverages to the public is conducted and in which any musical entertainment, singing, dancing in a designated area or other form of amusement is also permitted, and shall include such a room, place or space which provides incidental musical entertainment by live musicians or mechanical devices with or without dancing.

4. Dance Halls—Any public place in which dancing is carried on and to which the public may gain admittance either with or without the payment of a fee.

5. Person—An individual, partnership, club, association, corporation, society, or any other organized group of persons and shall include officers, directors, stockholders, partners and trustees of a club, corporation, partnership, association, or society.

Exhibit A, Resolution of Town Board of Town of North Hempstead Enacting Local Law No. 1 of 1973, Annexed to Foregoing Complaint.

6. Town of North Hempstead—The unincorporated area of the Town of North Hempstead, County of Nassau, State of New York.

SECTION 3.0—PROVISIONS

1. It shall be unlawful for any person conducting, maintaining, or operating a cabaret, bar and/or lounge, dance hall, or discotheque, or any other public place within the Town of North Hempstead to suffer or permit any waitress, barmaid, entertainer, or other person who comes in contact with, or appears before, or is likely to come in contact with or appear before persons with breasts uncovered in such a manner that the position of the breast below the top of the areola is not covered with a fully opaque covering, or the lower part of the torso uncovered or so thinly covered or draped as to appear uncovered; or to appear in any scene, sketch, act or entertainment with breasts or the lower part of the torso uncovered or so thinly draped as to appear uncovered. Reference to breasts in this section refers to females only. Reference to the lower part of the torso refers to both male and female.

2. It shall be unlawful for any person to appear in any cabaret, bar and/or lounge, dance hall, or discotheque or any public place with breasts uncovered in such a manner that the portion of the breasts below the top of the areola is not covered with a fully opaque covering, or the lower part of the torso uncovered or so thinly covered or draped as to appear uncovered; or to appear in any scene, sketch, act, or entertainment with breasts or the lower part of the torso uncovered or so thinly draped as to appear uncovered. Reference to breasts in this section refers to femals only.

Exhibit A, Resolution of Town Board of Town of North Hempstead Enacting Local Law No. 1 of 1973, Annexed to Foregoing Complaint.

Reference to the lower part of the torso refers to both male and female.

SECTION 4.0—PENALTY

Any person who shall violate any section of this local law shall be guilty of a violation punishable by a fine not exceeding Five Hundred ($500.00) Dollars, or imprisonment for a period not to exceed fifteen (15) days or both, Each day's continued violation shall constitute a separate violation.

SECTION 5.0—EFFECTIVE DATE

This local law shall take effect immediately upon the filing with the Secretary of State.

Dated: Manhasset, New York, June , 1973.

BY ORDER OF THE SUPERVISOR AND THE TOWN BOARD OF THE TOWN OF NORTH HEMPSTEAD
WILLIAM H. RYAN, JR.,
Town Clerk.

MICHAEL J. TULLEY, JR.
Supervisor.

Affidavit of Frederick Glenn, in Support of Order to Show Cause With Temporary Restraining Order.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

TITLE OMITTED IN PRINTING

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

FREDERICK GLENN, being duly sworn, deposes and says:

I am the manager of Salem Inn, Inc., one of the Plaintiffs herein, which is the operator of the Salem Inn at 352 Port Washington Boulevard in the Village of Port Washington, Town of North Hempstead, County of Nassau, State of New York.

During the eight years that I have operated the said bar, there has never been any criminal charge brought against the Plaintiff notwithstanding the fact that Plaintiff has until July 17, 1973, offered to its patrons entertainment in the form of dancers who have been topless and have worn panty hose and G-strings.

I have been advised that Local Law number 1-1973 of the Town of North Hempstead has gone into effect on July 17, 1973 by which topless dancing has been outlawed in the Town of North Hempstead. As a result, I have required my dancers to wear bikini tops. This has already resulted in a marked diminution of business since our clientele are accustomed to topless dancing entertainment and patronize our establishment with the expectation of being entertained thereby.

Our dancers are employed in that capacity only. They are not waitresses and perform no other function in the

premises. They dance on a stage and are well received by our clientele.

The substantial curtailment of our business resulting from our compliance with the ordinance can result in our having to go out of business.

Only adults are permitted to enter the premises. Patrons never go near the dancers. The dancing is performed in a decorous manner and never offends our patrons. Conspicuous signs clearly advise prospective patrons of the nature of the entertainment offered in the premises and thereby deter adults who would be offended by such entertainment from entering the premises.

I have been advised by my attorney that the ordinance violated the First and Fourteenth Amendments in that it is vague and overbroad and establishes a censorship of expression presumptively protected by the said First Amendment.

As a result of fear of prosecution under the ordinance, all dancers have been instructed to fully cover their breasts while dancing. The ordinance has, therefore, chilled the exercise by Plaintiff and its dancers of their First Amendment rights. Each day that the ordinance remains in effect, results in substantial monetary losses to the Plaintiff and results in a deprivation to our clientele of the right to view the constitutionally protected expression formerly disseminated in the premises. We are suffering irreparable injury by reason of the chill placed upon the exercise of our First Amendment rights by the ordinance. We respectfully request that this chill be removed by the granting of the relief sought herein.

No prior application has been made for the relief sought herein.

(Sworn to by Frederick J. Glenn, July 18, 1973.)

Affidavit of Nicholas Benevento, in Support of Order to Show Cause With Temporary Restraining Order.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

TITLE OMITTED IN PRINTING

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

NICHOLAS BENEVENTO, being duly sworn, deposes and says:

I am the President of M & L Rest, Inc., one of the Plaintiffs herein, which is the operator of the Miramar Bar at 672 Port Washington Boulevard in the Village of Port Washington, Town of North Hempstead, County of Nassau, State of New York.

During the two and a half years that I have operated the said bar, there has never been any criminal charge brought against the Plaintiff notwithstanding the fact that Plaintiff has until July 17, 1973, offered to its patrons entertainment in the form of dancers who have been topless and have worn panty hose and G-strings.

I have been advised that Local Law number 1-1973 of the Town of North Hempstead has gone into effect on July 17, 1973 by which topless dancing has been outlawed in the Town of North Hempstead.

Prior to that date, I consulted with Captain Tedford of the Port Washington Police Department and was advised that pasties would not be acceptable compliance with the said ordinance. As a result, I have required my dancers to wear bikini tops. This has already resulted in a marked diminution of business since our clientele are accustomed to topless dancing entertainment and patronize our establishment with the expectation of being entertained thereby.

Affidavit of Nicholas Benevento, in Support of Order to Show Cause With Temporary Restraining Order.

Our dancers are employed in that capacity only. They are not waitresses and perform no other function in the premises. They dance on a stage and are well received by our clientele.

The substantial curtailment of our business resulting from our compliance with the ordinance can result in our having to go out of business.

Only adults are permitted to enter the premises. Patrons never go near the dancers. The dancing is performed in a decorous manner and never offends our patrons. Conspicuous signs clearly advise prospective patrons of the nature of the entertainment offered in the premises and thereby deter adults who would be offended by such entertainment from entering the premises.

I have been advised by my attorney that the ordinance violated the First and Fourteenth Amendments in that it is vague and overbroad and establishes a censorship of expression presumptively protected by the said First Amendment.

As a result of fear and prosecution under the ordinance, all dancers have been instructed to fully cover their breasts while dancing. The ordinance has, therefore, chilled the exercise by Plaintiff and its dancers of their First Amendment rights. Each day that the ordinance remains in effect, results in substantial monetary losses to the Plaintiff and results in a deprivation to our clientele of the right to view the constitutionally protected expression formerly disseminated in the premises. We are suffering irreparable injury by reason of the chill placed upon the exercise of our First Amendment rights by the ordinance. We respectfully request that this chill be removed by the granting of the relief sought herein.

No prior application has been made for the relief sought herein.

(Sworn to by Nicholas Benevento, July 18, 1973.)

Affidavit of Joseph Donald Foley, in Support of Order to Show Cause for Temporary Restraining Order.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

TITLE OMITTED IN PRINTING

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JOSEPH DONALD FOLEY, being duly sworn, deposes and says:

I am the President of Tim-Rob Bar, Inc., one of the Plaintiffs herein, which is the operator of the Interlude Lounge at 1656 Hillside Avenue, New Hyde Park, New York, Town of North Hempstead, County of Nassau, State of New York.

During the three years that I have operated the said bar with topless dancers, there has never been any criminal charge brought against the Plaintiff notwithstanding the fact that Plaintiff has until July 17th, 1973, offered to its patrons entertainment in the form of dancers who have been topless and have worn panty hose and G-strings.

I have been advised that local law number 1—1973 of the Town of North Hempstead has gone into effect on July 17, 1973 by which topless dancing has been outlawed in the Town of North Hempstead. As a result, I have required my dancers to wear bikini tops. This has already resulted in a 50% diminution of business since our clientele are accustomed to topless dancing entertainment and patronize our establishment with the expectation of being entertained thereby.

Our dancers are employed in that capacity only. They are not waitresses and perform no other function in the

premises. They dance on a stage and are well received by our clientele.

The substantial curtailment of our business resulting from our compliance with the ordinance can result in our having to go out of business.

Only adults are permitted to enter the premises. Patrons never go near the dancers. The dancing is performed in a decorous manner and never offends our patrons. Conspicuous signs clearly advise prospective patrons of the nature of the entertainment offered in the premises and thereby deter adults who would be offended by such entertainment from entering the premises.

I have been advised by my attorney that the ordinance violated the First and Fourteenth Amendments in that it is vague and overbroad and establishes a censorship of expression presumptively protected by the said First Amendment.

As a result of fear of prosecution under the ordinance, all dancers have been instructed to fully cover their breasts while dancing. The ordinance has, therefore, chilled the exercise by Plaintiff and its dancers of their First Amendment rights. Each day that the ordinance remains in effect, results in substantial monetary losses to the Plaintiff and results in a deprivation to our clientele of the right to view the constitutionally protected expression formery disseminated in the premises. We are suffering irreparable injury by reason of the chill placed upon the exercise of our First Amendment rights by the ordinance. We respectfully request that this chill be removed by the granting of the relief sought herein.

No prior application has been made for the relief sought herein.

(Sworn to by Joseph Donald Foley, July 26, 1973.)

Affidavit of Nicholas Benevento, in Support of Motion for Preliminary Injunction.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

TITLE OMITTED IN PRINTING

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

NICHOLAS BENEVENTO, being duly sworn, deposes and says:

I am the president of M & L Restaurant, Inc., the operator of the Miramar Bar in Port Washington, New York, I am familiar with the facts of the instant proceeding, and make this affidavit in support of the pending motion for a preliminary injunction herein.

On August 10, 1973 your deponent, by reason of the seventy-five percent drop in business incurred as a result of plaintiff's compliance with the Ordinance against topless entertainment, facing the spectre of total insolvency, reinstituted the pre-existing policy of offering topless entertainment to the patrons of the Miramar Bar. As a result, police officers of the Port Washington police force entered the premises on August 10, August 11, August 12 and August 13, and on each of those occasions served the undersigned and a dancer with a criminal summons for violating the Ordinance. Thus, eight criminal prosecutions have been commenced against the undersigned and his employees in a four day period. Each of those proceedings could result in a fifteen day jail sentence and a five hundred dollar fine.

Affidavit of Nicholas Benevento, in Support of Motion for Preliminary Injunction.

From the foregoing it is quite apparent that the defendants not only intend to enforce this Ordinance but are doing so rigorously.

I have been advised by my attorney that the Ordinance is constitutionally invalid and in violation of the First and Fourteenth Amendment rights of myself, the dancers, and our patrons. He further advises me that I am not obligated to follow the mandates of an unconstitutional speech inhibiting law.

I cannot over emphasize that I am confronted with either going out of business for lack of patronage or offering my patrons the entertainment which has made the premises an aesthetic commercial success.

(Sworn to by Nicholas Benevento, August 16, 1973.)

Affidavit of Joseph Foley, in Support of Motion for Preliminary Injunction.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

TITLE OMITTED IN PRINTING

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

JOSEPH FOLEY, being duly sworn, deposes and says:

I am the President of Tim-Rob Bar, Inc., the operator of the Interlude Lounge, and a Plaintiff herein.

After offering topless entertainment for a period of three years at the above mentioned premises, I immediately discontinued such entertainment on July 17, 1973 when the town of North Hempstaed passed a law outlawing such entertainment in all public places.

In the period of over a month since that date my business has fallen over two-thirds and I am faced with insolvency. One of the Plaintiffs in this case, advised by our attorney that the statute is clearly unconstitutional in violation of First and Fourteenth Amendment rights, resumed offering topless entertainment after this action was commenced. He has recaptured his business as well as some of mine, but has suffered the commencement of four criminal prosecutions against him and four criminal prosecutions against his dancers.

By reason of the sanctions of the law and my fear of losing my liquor license, I have chosen to await a legal determination and sustain the losses in the interim. This is becoming extremely difficult and onerous. We are losing money every day.

Affidavit of Joseph Donald Foley, in Support of Order to Show Cause for Temporary Restraining Order.

Despite the fact that I am not disobeying the law, since the enactment of the ordinance, police officials have visited my premises daily to make sure that I am complying with the prohibitions of the law. It appears as if a substantial portion of my clientele are policemen who drink coca-cola. The very presence of the policemen in the premises inhibits patronage by my few remaining customers.

By reason of the foregoing, I have suffered greater damage as a result of the enactment of the ordinance than I would have suffered had a portion of the premises been consumed by flames.

In the course of argument before the Court on August 22, 1973, there seems to be some implication that the reason for the adoption of the ordinance was to maintain public peace and safety. This is wholly and completely untrue. In the three years of topless entertainment in the premises prior to the enactment of the ordinance, there was not one case of disorder or other criminal activity. The same is true of the other Plaintiffs whose premises are well known for decorous behavior.

I respectfully beseech this Court for prompt adjudication and vindication of the Plaintiffs' civil liberties which are not only being chilled but stifled by the ordinance in question. I have been advised by my attorney that the vindication of just such rights is the primary function of this Federal Court.

(Sworn to by Joseph Foley, August 22, 1973.)

Affidavit of Joseph H. Darago, in Opposition to Plaintiffs' Motion for a Preliminary Injunction.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

TITLE OMITTED IN PRINTING

STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

JOSEPH H. DARAGO, being duly sworn, deposes and says:

1. He is a duly licensed attorney in the State of New York and a Deputy Town Attorney of the Town of North Hempstead. He is admitted to practice in the Eastern and Southern Districts for New York and appears in this action as counsel to Francis F. Doran, Town Attorney of the Town of North Hempstead.

2. The affidavit is made in opposition to the affidavits in support of a motion by the plaintiffs in this action for a preliminary injunction restraining the effect and enforcement of the Town of North Hempstead Local Law No. 1—1973, hereinafter referred to as the "Local Law".

3. On July 10, 1973, the Town of North Hempstead, hereinafter referred to as the "Town", enacted the Local Law which restricts entertainment in public places which is commonly known as "topless dancing". A copy of the Local Law is annexed to the moving papers in this action and it is admitted that the same is a true and exact copy of the Local Law as enacted on July 10, 1973, by the Town Board after a public hearing pursuant to the provisions of the Municipal Home Rule Law, Article 2, Section 10.

Affidavit of Joseph H. Darago, in Opposition to Plaintiffs' Motion for a Preliminary Injunction.

4. Thereafter the Local Law as enacted was filed with the Secretary of State on July 16, 1973, and became effective on that date. A copy of the receipt of the Secretary of the State of New York is annexed hereto as Exhibit "A".

5. The plaintiffs, domestic corporations in the State of New York, engaged in the business of operating bars in the Town of North Hempstead, brought on this proceeding challenging the validity of this Local Law, alleging that the same is in violation of their civil rights and by reason of the Local Law's enactment, have suffered a curtailment of business.

6. It is alleged that by reason of the existence of this Local Law, a chilling of the First Amendment rights of the plaintiffs and their patrons has resulted. The plaintiffs claim that the chilling effect on their First Amendment rights and the First Amendment rights of their customers results from the Local Law being "so discretionary, vague, overbroad, void of objecting guidelines . . ." as to result in the chilling effect.

7. Further, the moving affidavits of the plaintiffs claim that each of the plaintiffs, prior to the enactment of the Local Law, employed dancers for the purposes of entertainment, which dancers danced with their breasts uncovered. They allege that as a result of the Local Law restrictions, they now "require the dancers to wear bikini tops". The result of this direction, it is alleged, is the dimunition of business.

8. The moving affidavits in this action clearly are inadequate to support the preliminary relief of injunction against the enforcement of the Local Law sought by these plaintiffs.

9. The moving affidavits are conclusory without a scintilla of evidence to support the claims that there has been

a loss in business or that the First Amendment rights of the plaintiffs and/or their patrons have been affected by a chill. The mere conclusion that business is off without economic proof of loss is without value to this action.

10. Further, the claim of the plaintiffs is rendered meaningless insofar as subsequent to the enactment of the Local Law, at least one or more of the plaintiffs have undertaken to violate the restrictions of the Local Law and have on one or more occasions continued to present topless dancing.

11. On July 13, 1973, your deponent visited the Miramar Lounge, owned and operated by M & L Rest, Inc., one of the plaintiffs herein, and while at the bar, observed between the hours of 9:00 P.M. and 10:15 P.M., a dancer entertaining the seven or eight patrons in the bar by dancing with her breasts uncovered.

12. The allegations in the affidavit of Nicholas Benevento, President of plaintiff, M & L Rest, Inc., that "as a result of fear of prosecution under ordinance (Local Law) all dancers have been instructed to fully cover their breasts while dancing. The ordinance (Local Law) has therefore chilled the exercise by plaintiff and its dancers of their First Amenment Rights" is meaningless, untrue and without basis in fact sufficient to support the claim of infraction by the Local Law of plaintiff's First Amendment rights.

13. The local authorities have issued summonses for violations of the Local Law and the enforcing authorities will in due course prosecute the violations in accordance with the provisions of the New York State Criminal Procedure Law.

14. The Local Law provides for a fine and/or imprisonment for each day's continued violation of the Local Law.

The plaintiffs, by reason of the violations, will be able to raise the issue of constitutionality and validity of this Local Law in the context of these actions in the District Court of Nassau County.

15. The jurisdictional doctrines as established in *Younger* v. *Harris,* 401 U.S. 37, 91 S. Ct. 736, 27 L. Ed. 2nd 669 (U.S. Sup. Ct., 1971), requires this Court in this action to invoke the *Pullman* doctrine to avoid a needless and unwarranted friction between the Federal Courts and the Courts of the State of New York.

16. Similarly, the plaintiffs in this case have failed to show any exception to the mandate of Section 2283 of Title 23, U.S.C.

17. If in fact the Local Law interferes with the First Amendment of the United States Constitution, the question should not be decided in this Court. It is submitted that the plaintiffs have failed to show that the Local Law in question is void on its face or in any sense an overbroad regulation of expression. No evidence is presented in the allegations in the moving papers that the restricted conduct is not such conduct within the reach of an applicable limiting construction readily to be ascertained through the criminal prosecutions which have been commenced.

18. Nor have the plaintiffs shown that the conduct prohibited by the Local Law is overbroad with respect to the specific acts in which they propose to engage or suffer others to engage in for their own benefit.

19. No overbroadness on the face of the Local Law is readily apparent. The act of dancing without a covering for the breasts and the permitting to do so by the owners and operators of the bars in the Town of North Hempstead is such an action which would be prohibited by the

terms of this Local Law under any construction applied to it.

20. It is submitted that by reason of the regulations contained in the Local Law that are directed to specific, definite acts of the plaintiffs, it is not subject to the defects of "vague prohibitions". The specific acts prohibited are clearly and narrowly defined and sufficiently and adequately clear in the text of the Local Law. The acts would be prohibited under any construction given the Local Law, and no injunction should lie. The Local Law being clear, mandates this Court to abstain until the resolution of the issues in the District Court of Nassau County wherein the issues of the constitutionality can be decided.

21. The Town, in enacting the Local Law, acts under the color of State Law by reason of the authorization granted to it by the Penal Law of the State of New York.

22. The Town, therefore, has enacted the Local Law under the color of its powers granted by State Statutes. Thus, the Local Law is in furtherance of the general police power of the Town granted by the Town Law of the State of New York. The general "police power" of the municipality to set standards for its health, safety and welfare are apposite to this matter. Akin to the right to make laws for land use, the right to regulate business comes within these general "police powers" in light of the community standards, as determined by the local legislative body after a public hearing.

23. The Town has sufficient basis based upon the record of the public hearing to regulate the specific conduct as set forth in the Local Law. A copy of the transcript of the public hearing is annexed hereto and marked Exhibit "B".

Affidavit of Joseph H. Darago, in Opposition to Plaintiffs' Motion for a Preliminary Injunction.

24. Any legal regulation infringes upon constitutional guaranties, but may be justified on the basis of the good and welfare of the community which is served by the restrictions.

25. The plaintiffs invoke their constitutional rights and the rights of their customers. Without assuming the standing to include the latter class of persons, the regulation does not infringe upon the right of those persons in any manner other than the way zoning laws and traffic laws would infringe upon the rights of expression.

26. It is submitted, therefore, that the plaintiffs have fallen short in this application for preliminary relief to prove or to even show evidence of a chilling effect of the Local Law due to its overbroadness or vagueness which warrants Federal Court interference with the State procedures.

WHEREFORE, it is respectfully requested:

(1) That this Court abstain from enjoining the enforcement of the Local Law #1.

(2) Stay this action pending the criminal prosecutions and resolution of all issues in the District Court, Nassau County, and any Appellate Court with the appropriate jurisdiction.

(3) In the alternative, declare immediate trial pursuant to Title 28, § 1980, et seq., U.S.C.

(4) Grant such other and further relief as to this Court is just and proper in this action.

(Sworn to by Joseph H. Darago, August 16, 1973.)

Summons.

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

Civil Action file No. 73-1200

SALEM INN, INC., M & L REST, INC., and TIM-ROB BAR, INC.,

Plaintiffs,

against

LOUIS J. FRANK, Individually and as Police Commissioner of Nassau County, FRANK DORAN, Individually and as town attorney of the Town of North Hempstead and HOWARD EINHORN, Individually and as Chief of Police of the Village of Port Washington,

Defendants.

You are hereby summoned and required to serve upon Kassner & Detsky plaintiff's attorneys, whose address is 122 East 42nd Street, New York, N.Y. 10017 an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

/s/ LEWIS OBGEL,
Clerk of Court.

/s/ MARC MILLER,
Deputy Clerk.

Date: August 9, 1973.

[Seal of Court]

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Answer of Francis F. Doran.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

TITLE OMITTED IN PRINTING

Defendant, Francis F. Doran, individually and as Town Attorney of the Town of North Hempstead, wrongfully sued herein as Frank Doran, individually and as Town Attorney of the Town of North Hempstead, by his attorney, Joseph H. Darago, as and for an Answer to the Complaint herein respectfully shows this Court and alleges:

DENIALS

1. Denies knowledge or information sufficient to form a belief as to the allegations contained in the paragraphs numbered 2, 3, 4, and 5.

2. Admits the allegations that Francis F. Doran, wrongfully sued herein as Frank Doran, is the Town Attorney of the Town of North Hempstead, except that he denies that portion of Paragraph 5 which alleges responsibility for enforcement of the laws of the Town of North Hempstead within the Town of North Hempstead, which responsibility is a question of law, the nature and extent of which is to be determined by this Court.

3. Denies knowledge and information sufficient to form a belief as to each and every allegation contained in paragraphs numbered 7, 10, 12, 13, 14, 15, and 16.

4. Denies knowledge and information sufficient to form a belief as to the allegations in Paragraph 17 of the Com-

plaint concerning any compliance by the plaintiffs with the law except that he denies any chilling effect by reason of the law on the exercise by the plaintiffs and their dancers of First Amendment rights.

5. Denies each and every allegation contained in paragraphs numbered 18, 19, 20, 21, and 22.

DEFENSES

6. Plaintiffs have failed to demonstrate sufficient standing for the relief herein requested, and, therefore, the Court lacks jurisdiction over the subject matter and the persons of the defendants herein.

7. The Court should refuse to exercise jurisdiction in this action on the grounds that State criminal proceedings have been instituted against one or more of the plaintiffs in this action.

8. Plaintiffs have failed to plead sufficient ultimate facts which show irreparable and immediate injury so as to be entitled to the relief sought herein.

WHEREFORE, defendants demand:

1. That the complaint herein be dismissed.

2. The costs and disbursements in this action.

3. Such other and further relief as to this Court may seem just, proper and equitable.

JOSEPH H. DARAGO
Attorney for Defendant
Francis F. Doran, individually and
as Town Attorney of the Town of
North Hempstead

Answer of Louis J. Frank.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

TITLE OMITTED IN PRINTING

The defendant, LOUIS J. FRANK, individually and as Police Commissioner of Nassau County, appearing herein by his attorney, JOSEPH JASPAN, County Attorney of Nassau County, as and for his answer to the complaint of the plaintiffs, alleges as follows:

I. Denies each and every allegation contained in Paragraph "1" of the complaint and its subdivisions, except that said defendant leaves for determination by the Court the legal conclusions alleged therein.

II. Denies that he has any knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraphs "2", "3", "4", "10", "12", "13", "14", "15" and "16" of the complaint.

III. Denies each and every allegation contained in Paragraph "5" of the complaint, except admits that LOUIS J. FRANK is the Police Commissioner of the County of Nassau and as such is responsible for the enforcement of the laws in those unincorporated areas in the Town of North Hempstead where there are no other police departments.

IV. Denies each and every allegation contained in Paragraphs "9", "11", "17", "18", "19", "20", "21" and "22" of the complaint.

Answer of Louis J. Frank.

AS AND FOR A FIRST, SEPARATE AND AFFIRMATIVE DEFENSE, SAID DEFENDANT ALLEGES AS FOLLOWS:

V. That in Paragraph "5" of the complaint, the defendant, LOUIS J. FRANK, is described as the Police Commissioner of the County of Nassau, and in which paragraph it is further alleged that he is responsible for the enforcement of the laws of the Town of North Hempstead.

VI. That as such Police Commissioner of the County of Nassau, the defendant, LOUIS J. FRANK, is not responsible for the enforcement of the laws of the Town of North Hempstead within the geographical limits of the Incorporated Village of Port Washington, nor is he responsible for the enforcement of the laws in other incorporated villages within the County of Nassau where there are separate village police departments.

VII. That there are no other allegations in the complaint with reference to any act or acts performed by the defendant, LOUIS J. FRANK, either in his individual capacity or as Police Commissioner of the County of Nassau, nor does the complaint charge said defendant either in his individual or representative capacity with a violation of any of the alleged rights of the plaintiffs.

VIII. That there is a failure in said complaint to state a claim upon which relief can be granted in favor of the plaintiffs against the defendant, LOUIS J. FRANK, either in his individual capacity or as Police Commissioner of Nassau County.

AS AND FOR A SECOND, SEPARATE AND AFFIRMATIVE DEFENSE, SAID DEFENDANT ALLEGES AS FOLLOWS:

IX. That the defendant, LOUIS J. FRANK, as Police Commissioner of the County of Nassau, by virtue of his office as such Police Commissioner and the duties incumbent upon him as such Police Commissioner, is obliged to direct and require the enforcement of all local ordinances, local laws and statutes which require police enforcement, in those areas under the jurisdiction of the Nassau County Police Department, and that such enforcement of such local ordinances, local laws and statutes are enforced by the police officers of the County of Nassau in the ordinary course of their duties as such police officers, under the jurisdiction of the defendant as Police Commissioner of the County of Nassau.

WHEREFORE, the defendant, LOUIS J. FRANK, individually and as Police Commissioner of Nassau County, demands judgment dismissing the complaint of the plaintiffs, together with the costs and disbursements of this action.

JOSEPH JASPAN
County Attorney of Nassau County
Attorney for Defendant

LOUIS J. FRANK

By

Louis Schultz
Senior Deputy County Attorney

Answer of Howard Einhorn.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

TITLE OMITTED IN PRINTING

Defendant, Howard Einhorn, individually and as Chief of Police of the Port Washington Police District, by his attorneys, Ressa & Nappi, as and for an answer to the complaint herein respectfully shows this Court and alleges:

DENIALS

1.) Denies knowledge or information sufficient to form a belief as to the allegations contained in the paragraphs numbered 2, 3, 4, and 5.

2.) Admits that the Defendant, Howard Einhorn, is Chief of Police of the Port Washington Police District and as such is responsible for the enforcement of the laws of the Town of North Hempstead in the areas encompassed by the Port Washington Police District.

3.) Denies knowledge and information sufficient to form a belief as to each and every allegation contained in paragraphs 6, 10, 12, 13, 14, 15, and 16.

4.) Denies knowledge and information sufficient to form a belief as to the allegations in Paragraph 17 of the Complaint concerning any compliance by the plaintiffs with the law except that he denies any chilling effect by reason of the law on the exercise by the plaintiffs and their dancers of First Amendment rights.

5.) Denies each and every allegation contained in paragraphs 18, 19, 20, 21, and 22.

WHEREFORE, defendant demands judgment dismissing the complaint together with the costs and disbursements of this action and for such other and further relief as to this Court may seem just and proper.

Yours, etc.

RESSA & NAPPI
Attorneys for Defendant
Howard Einhorn

To: JOSEPH H. DARAGO, Esq.
Attorney for Defendant
Francis F. Doran

KASSNER & DETSKY, Esqs.
Attorneys for Plaintiffs

JOSEPH JASPAN, Esq.
Nassau County Attorney